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TEOH VIN SEN

v.

TRUE CREATION SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[COMPANIES WINDING UP NO: D5-28-772-2006]
5 FEBRUARY 2008

C ***COMPANY LAW:*** *Winding up - Petition - Substitution as petitioners, application for - Whether applicants had right to substitute petitioner to continue winding up petition against respondent - Companies (Winding-Up) Rules 1972, r. 33(1) - Companies Act 1965, s. 218(2)(a)*

D This was an application (encl. 14) by 27 supporting creditors, also the plaintiffs in another civil suit ('S4 suit') who had obtained on 17 January 2007 judgment for damages against the respondent company, for an order that they be substituted as petitioners to the present winding up petition – presented by the petitioner on 30 October 2006 – against the respondent pursuant to r. 33(1) of the Companies (Winding-Up) Rules 1972 ('Rules'). The only issue requiring determination was whether the applicants had the right to substitute the petitioner to continue the winding up petition against the respondent. The applicants contended that their right to present the petition against the respondent existed on 17 January 2007 when the court in the S4 suit granted the order for damages to be assessed. Although the amount or quantum of damages payable had yet to be determined, the allocatur for the sum of RM37,956.50 was allowed on 16 August 2007. Both dates were before the application in encl. 14 that had been fixed for hearing for the first time on 11 December 2007. The applicants further contended that they, as supporting creditors, had the right to be substituted as the petitioner under r. 33 of the Rules. The respondent, on the other hand, submitted that in order for the applicants to succeed in their application herein, they must have the right to present the petition at the date when the petition was presented by the petitioner (30 October 2006), and not at the date when encl. 14 was sought as submitted by the applicants (11 December 2007).

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Held (dismissing the application):

(1) The applicant who is desirous of proceeding with the petition must show that at the time of the first presentation of the petition by the earlier petitioner, the applicant would have had the right to present the said petition. In the present application, the winding up petition was first presented by the earlier petitioner on 30 October 2006. The judgment obtained by the applicants *vide* S4 Suit was only granted on 17 January 2007, which was more than two months after the petition was first presented. The judgment had not crystallised yet at that time as damages needed to be assessed and costs to be taxed. The court only taxed the costs on 31 May 2007 and after review on 16 August 2007, the costs were finally fixed at RM37,956.50, almost ten months after the petition was presented. The above facts clearly showed that at the time when the petition was presented on 30 October 2006, the applicants were not creditors to the respondent and, therefore, had no right to present the said petition against the respondent. (paras 11, 12 & 13)

(1a) Where a petition is based on s. 218(1)(e) and (2)(a) of the Companies Act 1965 ('Act'), presentation of the petition can only be instituted in court upon the petitioner complying with the relevant requirements under s. 218(2)(a) of the Act. In this instance, there was no evidence to show that the applicants had served the statutory notice under s. 218(2)(a) of the Act at any time on the respondent. That being the case, they had no status to apply for substitution as a petitioner under r. 33(1) of the Rules. The judgment dated 17 January 2007 *vide* S4 suit, which was obtained after the petition was presented, clearly showed that the amount of damages was to be assessed. The allocatur dated 16 August for the sum of RM37,956.50 also crystallised after the petition was presented. As such, there was no legal basis to allow the applicants to substitute the petitioner in the present winding up proceedings against the respondent. The applicants would always be at liberty to initiate fresh winding up proceedings against the respondent by serving their own statutory notice under s. 218(2)(a) of the Act and,

A thereafter, to present a fresh petition if the respondent failed to comply with the said notice within three weeks, after all the debts were determined and crystallised. (paras 19, 20 & 21)

B **Case(s) referred to:**

Bank Industri & Teknologi Malaysia Bhd v. Alom Building Systems Sdn Bhd [2006] 3 CLJ 506 HC ***(refd)***

Lindeteves–Jacoberg (Malaya) Sdn Bhd v. Electrical Switchgears Automation (M) Sdn Bhd [1999] 6 CLJ 109 HC ***(refd)***

C *Morgan Guaranty Trust Co New York v. Lian Seng Properties Sdn Bhd & Anor [1989] 1 CLJ 452; [1989] 2 CLJ (Rep) 133 HC* ***(refd)***

Perak Pioneer Ltd v. Petroliam Bhd [1986] 3 WLR 105 ***(refd)***

Legislation referred to:

Companies (Winding-Up) Rules 1972, r. 33(1)

D Companies Act 1965, ss. 218(1)(e), (2)(a), 219(2)

For the applicants - Hargopal Singh; M/s Hargopal Singh & Co
For the respondent - Adnan Seman; M/s Abdul Aziz & Assoc

Reported by Suresh Nathan

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JUDGMENT

Ramly Ali J:

F **[1]** Enclosure 14 is an application by the 27 Supporting Creditors, who are also the plaintiffs in Civil Suit No. S4-22-1181-2003, who had on 17 January 2007 obtained judgment in their behalf for damages against the respondent company, for an order that they be substituted as the petitioners to the present G winding-up petition against the respondent company pursuant to r. 33(1) of the Companies (Winding-Up) Rules 1972, and that costs be paid out from the assets of the respondent company.

[2] The grounds of this applications are as follows:

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(a) that all the 27 applicants have on 17 January 2007 obtained an order (in S4 Suit) against the respondent for damages to be assessed. The assessment for damages is fixed for decision before the registrar on 13 February 2008 together with on I Allocatur dated 16 August 2007 for the sum of RM37,956.50.

(b) that the court has assessed the cost of the proceedings and *vide* order dated 16 August 2007 ordered that the sum of RM37,956.50 including the Allocatur fee to be paid by the respondent to the plaintiffs. That a Notice of Intention to Appear in the present proceedings has been filed on 6 August 2007.

(c) that a s. 218 notice has been served on the respondent on 5 September 2007 at the registered address and on 4 September 2007 at the business address. The affidavit of service of Vijaya a/l Segaran duly affirmed on 18 September 2007 has been filed in this court.

Undisputed Factual Background

[3] The undisputed facts relevant to this application are as follows:

(i) On 30 October 2006, the present winding up petition was presented by the petitioner;

(ii) On 7 January 2007 the Kuala Lumpur High Court *vide* Civil Suit No. S4-22-181-2003 (S4 Suit) granted the applicants judgment of declaration terminating all the contracts and damages to be assessed, interest and costs;

(iii) On 31 May 2007, the court taxed the costs and granted costs of RM22,956.50;

(iv) Applicants being dissatisfied filed a review on costs taxed and on 16 August 2007 increased costs to RM37,956.50;

(v) On 4 September 2007 applicants serves a statutory notice under s. 218 in respect of order dated 16 August 2007 for RM37,956.50 on the respondent.

(vi) On 18 September 2007, the petitioner appeared in court to withdraw the petition in open court as the debt has been fully settled by the respondent but objected by the applicants' solicitor who promised to file application for substitution. (ie, the present application).

A **Issue**

[4] The only issue that need to be decided by this court is:

(i) whether the applicants have the right to substitute the petitioner to continue the winding up petition dated 30 October 2006 against respondent.

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Applicants' Contentions

[5] The applicants contend that the applicants' right to present the petition against the respondent existed on 17 January 2007 when the court in Civil Suit No. S4-22-181-2003 (S4 Suit) granted the order dated 17 January 2007 for damages to be assessed. The amount or quantum of damages payable has yet to be determined. Nevertheless, the Allocatur for the sum of RM37,956.50 was allowed on 16 August 2007. Both dates are before the application in encl. 14 herein which has been fixed for hearing for the first time on 11 December 2007.

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[6] Hence, the applicants further contend that they, as Supporting Creditors have the right to be substituted as the petitioner under r. 33 of the Companies (Winding-Up) Rules 1972.

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Respondent's Contentions

[7] The respondent, on the other hand submits that in order for the applicants to succeed in their application herein, they must have the right to present the petition at the date when the petition is presented by the petitioner, which is on 30 October 2006; and not at the date when the present application (encl. 14) for substitution is sought as submitted by the applicants ie, 11 December 2007.

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Rule 33 Of The Companies (Winding-Up) Rules 1972

[8] The relevant provisions for consideration on this matter is r. 33 of the Companies (Winding-Up) Rules 1972, which states as follows:

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(1) When a petitioner is not entitled to present a petition or, whether so entitled or not, where he:

(a) fails to take all the steps prescribed by these Rules preliminary to the hearing of the petition.

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(b) consents to withdraw his petition or to allow it to be dismissed or the hearing to be adjourned; or

(c) fails to appear in support of his petition when it is called on in Court on the day originally fixed for the hearing thereof or any day to which the hearing has been *adjourned or if appearing does* not apply for an order in terms of the prayer of his petition.

the Court may upon such terms as it thinks just substitute as petitioner any person who, in the opinion of the Court, would have a right to present the petition and who is desirous of proceeding with the petition.

[9] Rule 33(1) gives the discretion to the court to substitute as petitioner any person who would have a right to present the petition and who is desirous of proceeding with the petition. The word "the petition" in r. 33(1) refers to the earlier petition filed by the petitioner. The intending petitioner must be some one who has the right to present the earlier petition. (See: *Bank Industri & Teknologi Malaysia Bhd v. Alom Building Systems Sdn. Bhd* [2006] 3 CLJ 506). Rule 33(1) is silent as to when the intending petitioner must have that "right" to present the said petitioner: Is it at the time when the earlier petition was presented or filed, or is it at the time when the application for substitution was filed?

[10] The real position of law as to the right of the applicants to substitute the petitioner is not that they must have the right to present the petition at the date when the substitution is sought as submitted by them but the applicants must have the right to present the petition at the date when the petition is presented by the earlier petitioner which is on 30 October 2006.

[11] The court is of the view that the above proposition represent the correct position of the law because if a winding up order is eventually granted, the order relates back to the date when the petition was first presented by the earlier petitioner, because s. 219(2) of the Companies Act 1965 stipulates that "winding-up will be deemed to have commenced at the time of the presentation of the petition for the winding-up …". Therefore, the applicant who is desirous of proceeding with the petition must show that at the time of the first presentation of the petition by earlier petitioner, he would have had a right to present the said petition.

[12] In the present application, the winding up petition was first presented by the earlier petitioner (Teoh Vin Sen) on 30 October 2006. The judgment obtained by the applicants *vide* Civil Suit No. S4-22-181-2003 was only granted on 17 January 2007 (more than two months after the petition was first presented). The judgment has not crystallized yet at that time as damages need to be assessed and costs to be taxed. Only on 31 May 2007, the court taxed the costs and after review on 16 August 2007, the costs were finally fixed at RM37,956.50. (almost ten months after the petition was presented).

[13] The above facts clearly show that at the time when the petition was presented on 30 October 2006, the applicants were not creditors to the respondent and therefore have no right to present the said petition against the respondent.

[14] The first issue that need to be determined in an application for substitution under r. 33(1) is the status of the applicant. If the judgment obtained or the crystallization of debt occurred well after the date of presentation of the winding-up petition, then the applicant's right to rank as creditor for the purpose of r. 33(1) cannot be considered. (See: *Morgan Guaranty Trust Co New York v. Lian Seng Properties Sdn Bhd & Anor* [1989] 1 CLJ 452; [1989] 2 CLJ (Rep) 133).

[15] The applicants rely on the case of *Lindeteres–Jacoberg (Malaya) Sdn Bhd v. Electrical Switchgears Automation (M) Sdn Bhd* [1999] 6 CLJ 109, to support their contention that they are qualified to seek substitution as petitioners because they would have a right to present a petition at the date when their application for substitution was filed in court (ie, on 25 September 2007).

[16] After going through the details of the full judgment in *Lindeteves – Jacoberg* case *(supra)*, the court cannot fully agree with the applicant on this issue. The main issue in that case is whether the words "would have" (as appear in r. 33(1) of the Companies (Winding-Up) Rules 1972) in relation to a right to present a petition, indicates a future qualification. In that case the court held that those words do not indicate futurity. In that case, the court referred to the Privy Council's judgment in *Perak Pioneer Ltd v. Petroliam Bhd* [1986] 3 WLR 105, at p. 112 C-G where the Privy Council analysed r. 33 of the Companies Winding-Up Rules

of Hong Kong, which is not identical to our r. 33(1), where, by the way, the thing that the intending substitute would have a right to present is expressed to be "a petition", not as "the petition" as appeared in our r. 33(1). In passing the court commented: "From the passage at p. 112 G, it may be understood that since the substitution was sought, he qualified as a person who "would have a right to present a petition."

[17] The phrase was taken from p. 112 G of the Privy Council judgment in *Perak Pioneer* case *(supra)*, dealing with a provision in Hong Kong Rules which is not identical with our r. 33(1). The citation of the phrase is not intended to be taken as decision or ruling of the court in *Lindeteves – Jacoberg* case *(supra)*.

[18] What is more important in *Lindeteves – Jacoberg* case *(supra)* which represent decision or ruling of the court is expressed in the following passage (at p. 111, para d-f):

> Where the case of an intending petitioner depends on the presumption under s. 218(2)(a) for proof of the debtor company's inability to pay its debts, the petitioner would have no case to bring until the presumption has arisen after the statutory notice has been issued and served and the company has, for three weeks, failed to satisfy the demand of the statutory notice. Until the presumption arises, the intending petitioner would have no cause of action to be qualified to present a petition. It must follow that he would have no cause of action to qualify to be substituted as a petitioner under r. 33(1). When a petitioner expresses a desire to withdraw his petition, the Respondent company is entitled, were it not for a proposed substitution, to be freed of the petition, and it would not be fair to the company to allow the petition to remain hanging over its head for the sake of enabling another party to qualify for substitution who is known for certain to be not yet qualified.

[19] The court is in full agreement with the decision in *Lindeteves – Jacoberg* case as stated above. Rule 33(1) states about "a right to present the petition" ie, the particular petition filed by the original petitioner. Presentation of a petition takes place when the petition to wind-up the respondent company is filed in court. Where a petition is based on ss. 218(1)(e) and 218(2)(a) of the Companies Act 1965, presentation of the petition can only be instituted in court upon the petitioner has complied with the relevant requirements under s. 218(2) (a) ie:

(a) the debt in question must be more than RM500;

(b) the creditor must have served a notice under s. 218(2)(a) on the company demanding for payment of the debt due;

(c) within three weeks from the service of the notice, the company neglected to pay the sum demanded, or to secure or compound for it to the reasonable satisfaction of the creditor.

(d) The presumption that a company is unable to pay it's debts only arises when all the above elements are fulfilled. Only at that stage, a creditor is entitled to present winding-up petition against the company, but not before that. In other words, a creditor's right to present a winding-up petition against a company arises only after the statutory notice under s. 218 is served on the company and the company has within three weeks failed or neglected to satisfy the demand of the said notice. Therefore, a person who has not served the statutory notice under s. 218(2)(a) on the company has no "right to present the petition", eventhough he is desirous of proceeding with the petition.

[20] In the present case, there is no evidence to show that the applicants have served the statutory notice under s. 218(2)(a) at any time on the respondent. That being the case, the court is of the view that the applicants have no status to apply for substitution as petitioner under r. 33(1) of the Companies Winding-Up Rules 1972. The judgment dated 17 January 2007 *vide* Civil Suit No. S4-22-181-2003 which is after the petition was presented clearly shows that the amount of damages is to be assessed; and the Allocatur dated 16 August 2007 for the sum RM37,956.50 referred to by the applicants also crystallised after the petition was presented.

[21] As such, the court finds that there is no legal basis to allow the applicants to substitute the petitioner in the present winding-up proceedings against the respondent. The applicants will always be at liberty to initiate a fresh winding-up proceedings against the respondent by serving their own statutory notice under s. 218(2)(a) and thereafter to present a fresh petition, if the respondent fails to comply with the said notice within three weeks, after all the debts are determined and crystallised.

Conclusion

[22] On the above considerations, the court dismisses the applicants' application *vide* encl. 14, with costs.